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Nos. 82-952, 82-992, 82-953 & 82-1001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF MARYLAND, *et al.*, PEOPLE OF THE STATE OF ILLINOIS, TANDY CORPORATION, and NORTH AMERICAN TELEPHONE ASSOCIATION,

Appellants,

vs.

UNITED STATES OF AMERICA and WESTERN ELECTRIC COMPANY and AMERICAN TELEPHONE AND TELEGRAPH COMPANY,

Appellees.

On Appeal From The United States District Court For The District of Columbia

AT&T's RESPONSE TO THE MOTION OF TELEPHONICS EQUIPMENT CORPORATION FOR LEAVE TO INTERVENE

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Telephonics Equipment Corporation ("TEC") moves to intervene in these appeals to challenge the entry of the MFJ on a ground that none of the appellants in the case have sought to raise. TEC claims that the District Court abused its discretion in entering the Modification of Final Judgment ("MFJ") because the District Court "sought to limit the use that may be made of the consent decree by private parties" (pp. 7–10) and allegedly did not consider "the public benefit, if any, to be derived, from a determination of the issues at trial" (pp. 10–11). Even assuming, *arguendo*, that there were any reason or basis for allowing TEC to participate, its challenges to the entry of the MFJ are so lacking

in merit that they should not delay the expeditious consideration of these appeals or stand in the way of affirmance of the judgment below.

1. TEC's claim that it should now be permitted to intervene is extraordinary. Approximately 110 entities either moved to intervene in this case in the District Court between January 8, 1982 and August 24, 1982, or filed briefs in response to the District Court's Order of May 25, 1982. These 110 entities represent every segment of the public and include scores of competitors of Bell System companies, many of which, unlike TEC, had already asserted private antitrust claims against the Bell System. The District Court allowed each of these entities to intervene to appeal the entry of the MFJ. J.A. 191–194, 201–03. TEC not only did not file a timely petition to intervene in the District Court (J.A. 201–03), but TEC waited until December 15, 1982—one week *after* the jurisdictional statements were filed—to file its motion in this Court. The sole reason given for this delay is that TEC had thought that a party to the case would present the issues TEC now seeks to raise.[1] To allow TEC to interject itself into these proceedings at this time would disserve orderly procedure *especially* if it could in any way delay—as it need not—the expeditious resolution of the appeals.

2. TEC's claims on the merits are frivolous. The District Court fully complied with the Congressional directive that it *consider* "the impact of [a consent decree's] entry upon private plaintiffs who claim specific injury" from the violations alleged and the "public benefit, if any, to be derived from a determination of these issues at trial." 15 U.S.C. §16(c)(2). Although it recognized that "the ultimate decision with respect to this issue must rest with the court in which such litigation may be brought," J.A. 144, the

[1]Contrary to TEC's misstatement (p. 6), Jack Faucett Associates, Inc. *did* "perfect" an appeal raising these issues. Jack Faucett, however, voluntarily dismissed its appeal on December 8, 1982, presumably because it recognized the appeal to be meritless.

District Court concluded that the judgment probably would not be given prima facie effect in future private litigation, under §5(a) of the Clayton Act, 15 U.S.C. §16(a). J.A. 142–44. It found that the absence of prima facie or collateral estoppel effect was not a sufficient reason to refuse to enter the MFJ and attempt to force the United States to continue to litigate its claims, especially because the Government will assist private plaintiffs by making the trial record in *United States* v. *AT&T*, No. 74-1698 (D.D.C.), available to them. J.A. 35 n. 93.

TEC's argument that the District Court "limited the use that may be made of the consent decree by private parties" is nonsense. The District Court expressly recognized that it could *not* affect a private plaintiff's use of the MFJ and *held*—in accordance with the arguments of both AT&T and the United States and the very decisions TEC cites (pp. 8–9 & n. 1)—that the question of what effect the MFJ will have in future private suits is committed to "the court in which such litigation may be brought." J.A. 144; *accord*, *Emich Motors Corp.* v. *General Motors Corp.*, 340 U.S. 558, 569–71 (1951).[2]

Nor is there any basis for TEC's related argument (pp. 9–10) that the District Court abused its discretion in entering a decree that did not, by its terms, adjudicate antitrust liability and that therefore appeared not to be entitled to prima facie effect in

[2]For example, in *State of Michigan* v. *Morton Salt Co.*, 259 F.Supp. 35, 61–63 (D. Minn. 1966), *aff'd on other grounds sub nom. Hardy Salt Co.* v. *State of Illinois*, 377 F.2d 768 (8th Cir.), *cert denied*, 389 U.S. 912 (1967), the District Court held that the fact that a consent judgment provided that it did not adjudicate antitrust liability did not prevent the court in a future private suit from deciding whether it is "consistent with the purpose of Section 5(a)" not to give the decree prima facie effect. Whether *Morton Salt* is correct or whether it has any applicability to the facts of the case at bar, it establishes that the question of the prima facie effect of the MFJ is a question for another case, not for these appeals.

private suits. Congress recognized that approximately eighty percent of all Government antitrust cases end in consent decrees "in which the defendant does not admit to having violated the law as alleged in the Complaint." S.Rep. No. 93-298, 93d Cong., 1st Sess., p. 5 (1973); *accord*, H.R. Rep. No. 93-1463, 93d Cong., 2d Sess., p. 6 (1974). The legislative history makes it explicit that the Tunney Act "is not intended" to force a District Court to reject such proposed decrees and make the government "go to trial for the benefit of potential private plaintiffs." S. Rep. No. 93-298, *supra*, pp. 6–7; H.R.Rep. No. 93-1463, *supra*, p. 8. Where, as here, a consent decree achieves the Justice Department's antitrust objectives, Congress "believe[d] that in the majority of instances the interests of private litigants can be accommodated without the risk, delay, and expense of the government going to trial" by, for example, the Antitrust Division's making available information and evidence obtained by the government. S.Rep. No. 93-298, *supra*, pp. 6–7; H.R.Rep. No. 93-1463, *supra*, p. 8. In view of the Antitrust Division's commitment to make its materials available to private plaintiffs (J.A. 35 n. 93) and the fact that large and small private plaintiffs have pursued actions against AT&T even without this assistance (*id.*), there is no basis for any claim that the District Court abused its discretion.

The Bell System's single objective is to end the uncertainty that threatens the national telephone network at the earliest possible time. TEC's substantive claims are so frivolous that they need not stand in the way of the prompt resolution of these appeals.

Whether TEC's motion to intervene is granted or denied, the judgment should be affirmed.

Respectfully submitted,

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